12-18-1860

John P. Baldwin.

JOHN P. BALDWIN.

DECEMBER 18, 1860.—Reported from the Court of Claims, committed to a Committee of the Whole House, and ordered to be printed.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

JOHN P. BALDWIN *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Petition to Congress and accompanying papers, referred by the Senate to the Court of Claims, transmitted to the Senate.
3. Depositions of William Cooley and Charles Horne, filed in the Court of Claims by claimant on the 30th day of October, 1858; also, depositions of William H. Wall, William Rigby, William Cooley, and Alexander Patterson, filed in the Court of Claims by claimant, March 19, 1850, transmitted to the Senate.
4. Claimant's brief.
5. Solicitor's brief.
6. Opinion of the court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of said court, at Washington, this 17th day of December, A. D. 1860.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable the judges of the Court of Claims:

The petition of John P. Baldwin, a citizen, late of Dade county, now of Monroe, in the State of Florida, respectfully represents: That in the latter part of the year 1835 a Spanish brig, called the Gil Blas, was wrecked on the Florida beach, about 35 miles northward of Cape Florida; that a short time after she was sold at auction at Key West, with her cargo, as she lay on the beach, and was purchased by your petitioner; that early in the year 1836 the said brig and her cargo was set fire to and consumed by the naval officers of the govern-

ment, in order to prevent the possibility of said schooner and cargo falling into the hands of the Indians, with whom the government was then at war; that the said cargo consisted of the following articles:

6 tons of lead, valued at	$480 00
5 tons of kentledge	100 00
30 water casks	75 00
2 chain cables	300 00
3 anchors	75 00
Hull, sails, and rigging	170 00
	1,200 00

Your petitioner further represents that the destruction of the said brig and cargo for the "public good" is fully set forth in the declaration made on the 26th of July, 1836, by Thomas Leib and George Clark, lieutenants in the United States navy, hereto annexed, and the value of the same is shown by the depositions of witnesses, taken under the order of the district judge of the Territory of Florida, to be found in the papers referred by the Senate of the United States to this court.

Your petitioner further represents that if the said property had not thus been destroyed he would have been able to save the same, and to have realized by his purchase more than the amount at which the said articles are valued, and that he was at the time saving said articles, and that by reason of the act aforesaid the said articles have become wholly lost to him.

Your petitioner states that this claim was presented to the Senate the 1st session of the 29th Congress; that an adverse report, No. 58, was made at that Congress, but the same was recommitted, and a favorable report, No. 202, made. That on the 3d of August, 1846, 11th of February, 1848, and 30th of June, 1856, the said claim was also favorably reported on by the Senate committees, and that at the present session the same was referred by resolution of the Senate to this honorable court.

Your petitioner further represents that he is the sole owner of the claim, and he prays that a bill may be reported in his favor for the amount herein stated, together with the interest due thereon.

P. PHILLIPS, *Solicitor for Petitioner.*

Sworn to and subscribed before me this 8th day of February, 1858.

WM. MARIM, *United States Judge.*

JOHN P. BALDWIN.

TERRITORY OF FLORIDA, COUNTY OF DADE,
Indian Key, July 26, 1836.

We, the undersigned, thinking it best for the public good, did set fire to the brig Gil Blas, that she might become covered with sand, and that all traces of her might be destroyed, to prevent the Indians

ever getting from her any lead or other articles which would be of any use to them.

JAMES M. ARMSTRONG,
Master of U. S. schooner Motto.
THOS. J. LEIB,
Lieutenant United States Navy.

I also certify that I was present at the burning of said brig Gil Blas, and that there was on board of said brig her chain cables and two anchors.

GEORGE CLARK, *United States Navy.*

IN THE COURT OF CLAIMS.

JOHN P. BALDWIN *vs.* THE UNITED STATES.

The evidence shows that, in the latter part of 1835, the Spanish brig Gil Blas was wrecked off the coast of Florida; that she was sold at auction at Key West as she lay stranded on the beach, and that the claimant became the purchaser.

That the officers of the United States, "thinking it best for the public good, did set fire to said brig, that she might be covered with sand, and that all traces of her might be destroyed, to prevent the Indians ever getting from her lead or other articles which would be of any use to them. (See certificates, p. 4.)

This certificate was given by Lieut. Lieb—"to be forwarded to John P. Baldwin, the owner"—to Charles Howe, at the time deputy collector of the customs at Key West. (Dep. of Howe, p. 23.)

To ascertain the damage done to him, Baldwin filed his petition in the district court of the United States, praying that, for the ascertainment of what indemnity was justly due from the government, appraisers should be appointed.

This was done, and the return of the appraisers showed the loss to be $1,200. (p. 8.) The depositions of Peter Scott and William Cooley (pp. 6 and 7) accompany this report. Scott is shown to be dead, and Cooley has been examined in this case. (p. 23.)

In this latter examination he refers, for value of the different articles, to his answers to the interrogatories made by him soon after the burning of said brig.

In addition to these, we have also the deposition of Wade. S Rigby, (p. 9,) that the brig and cargo could have been brought to Key West; that the Indian hostilities would not have prevented this; and that the burning of the brig occasioned the loss of the indestructible articles, as they were covered up by the shifting sands, and thus all trace of their locality lost.

This is also confirmed by the depositions of George Aldersdale, (p. 10,) Capt. N. L. Coste, (pp. 10, 11,) and William Rigby, (p. 19.)

The case as made by the evidence shows that the property of the petitioner was destroyed for the public good by the authorized agents

of the government, and the public treasure must make compensation. (See 2 Kent's Com., p. 339, and notes.)

It can make no difference as to the liability that the property was destroyed and not used by the government.

A vessel may be taken from the owner in time of war, when the public interest demands it; or it may be destroyed to prevent its falling into the hands of the enemy. In the one case, as well as in the other, there is an *individual* loss, and a *public use*, in the constitutional sense, which entitle the party to a just compensation.

P. PHILLIPS,
Solicitor for Petitioner.

JUNE 9, 1859.

JOHN P. BALDWIN vs. THE UNITED STATES.

SOLICITOR'S BRIEF.

Claim for the loss of property on board of a stranded vessel in Florida, which vessel was burnt, by order of a naval officer, to prevent such property falling into the hands of the Indians during the war with them in 1836.

MATERIAL FACTS AS UNDERSTOOD BY THE SOLICITOR.

First. The plaintiff claims that he was the owner of the Spanish brig Gil Blas and the property on board of her.

Second. That the brig was stranded on the eastern coast of Florida, near New River, about thirty-five miles northward of Cape Florida, from two to three hundred miles from Key West, in the fall of 1835. (Rigby's ev., Record, p. 19.)

Third. That said brig had on board when she stranded a quantity of lead, supposed to be six tons; also a quantity of kentledge; but her sails and rigging, or most of them, with some lead, were taken to Key West. (Cooley's statement, Record, p. 7.)

Fourth. That said brig was not bilged, and she could have been readily extricated from the beach, and, with her cargo, taken to Key West, and the owner could have employed the Florida wreckers to have helped him. (Rigby's statement, Record, p. 9.)

Coste says: "This one (wreck Gil Blas) could readily have been saved and brought to this port (Key West) had the wreckers have been there at the time." (Record, p. 11.)

Fifth. "That the said brig was sold at Key West, at public outcry, in the month of December, 1835," to plaintiff. (Rigby's statement, Record, p. 9.)

Cooley says: "That during said year she (the brig Gil Blas) was sold at auction at Key West, by order of her captain, as she laid on the beach." (Record, p. 7.)

Sixth. Plaintiff claims to have acquired his title by purchase, at public auction, in December, 1835.

"I became the owner of the brig and a part of her cargo by purchase, at public auction, in December, 1835, and I immediately begun to make preparations to bring them to this port, (Key West.) The major part of the cargo had been saved by wreckers before the sale." (Record, p. 16.)

Seventh. The plaintiff saved a portion of his purchase.

The plaintiff says: "I immediately commenced making preparations to save my property, and secured and brought some of it to this place, (Key West;) but in consequence of cold weather and the prevailing winds, some little delay occurred in obtaining wreckers to go up to her." (Record, p. 17.)

Eighth. That on the 26th of July, 1836, some eight months after said plaintiff claims to have purchased said brig and her cargo, she was burnt, by direction of an officer of the navy, to prevent the lead and other articles on board being taken by the Indians.

Lieb and Armstrong, of the navy, certify to William Cooley, under date of July 26, 1836, as follows:

"SIR: We, the undersigned, thinking it best for the public good, did set fire to the brig Gil Blas, that she might become covered with sand, and that all traces of her might be destroyed, to prevent the Indians ever getting from her any lead or any other articles which would be of any use to them." (Record, p. 7.)

Ninth. What articles were taken from the wreck by the wreckers for the captain and owners is not shown, nor does it appear that they took away and carried to Key West for the plaintiff is not proved.

Tenth. The proof does not show what particular articles or what quantity were on board of the brig when she was burnt, though the officers destroying her understood there was lead and some other articles on board.

Eleventh. There is no evidence that the plaintiff, for months previous to the burning, had been taking any measures to save the vessel or to remove her cargo. Both seem to have been abandoned.

Twelfth. The wreckers employed by plaintiff were, in fact, driven off by the Indians.

From the plaintiff's own statement, (Record, p. 17,) it seems he sent wreckers to the vessel, but they were delayed in starting by the cold weather and winds. It is fair to presume that they went as soon as it became a little warmer. A party did go, and they abandoned the work on account of the presence of Indians.

Cooley testifies: "I was employed by John P. Baldwin to get the vessel off and save the cargo. When in the act, witness's family were all murdered by the Indians while residing about nine miles from the vessel; and in consequence of the hostile Indians being so thick on the coast and in the vicinity of the brig, had to abandon the work and discharge a large number of men that I had employed by order of John P. Baldwin." (Record, p. 23.)

Thirteenth. There is no evidence that the plaintiff made any further effort to save the vessel or cargo.

Fourteenth. There is no evidence of the value of the property on board at the time of the burning, situated as it was in the Indian country, and so distant from Key West.

Fifteenth. There is no evidence what plaintiff paid for the wreck and her cargo, or that he, in fact, paid anything.

Sixteenth. There is no evidence that the wreck and cargo were sold by order of any court having jurisdiction thereof.

Seventeenth. There is no evidence that the captain had any power or authority to make sale of the wreck or cargo; nor is there proof that the person referred to as captain was really such captain.

Eighteenth. The plaintiff produces no bill of sale; nor does he prove any delivery of the property he claims; nor any that he, in fact, paid anything whatever for it.

Nineteenth. There is no evidence that there was a necessity for the captain selling; but, on the contrary, the proof is clear that there was no such necessity at the time of the stranding in 1835.

Rigby says: "Furthermore, this deponent saith that said property could all have been saved had she not have been destroyed." (Record, p. 19.)

Simonton says: "It was not anticipated that the hull could be got afloat, but all the other articles could have been saved without difficulty by the wreckers if she had been let alone by the navy officers." (Record, p. 18.)

The plaintiff said: "That I could and would have saved them, (the vessel and cargo,) that I had the means of so doing, and that they were safe and secure on the beach, and might have remained so for a great length of time had it not been thus destroyed, must be abundantly evident from the depositions annexed, and from the fact that I had, after my purchase, and before she was burnt, saved a portion of the cargo," &c. (Record, p. 17.)

Rigby says: "She (the brig) could have been readily extricated from the beach, and with her cargo brought to this port"

"The *owners* might have saved the brig with ease, and everything in and on her, had she not been thus destroyed." (Record, p. 9.)

Twentieth. That it appears from the evidence that when the vessel was first stranded she and her cargo could have been saved, and the cargo was mostly saved; but that afterwards, when the Indians became numerous and troublesome, they could not be saved, and were not, but were abandoned by the agent of the plaintiff.

LEGAL PROPOSITIONS.

FIRST. *The plaintiff shows no sufficient evidence of title to either the vessel or cargo.*

The plaintiff's claim rests exclusively upon an alleged sale at Key West, by the captain, of the vessel and cargo, which were not present, but were some two or three hundred miles distant, and which was made without delivery or bill of sale, and without proof of consideration, and without proof of any power or authority conferred upon the captain by the owners of either the vessel or cargo. To the validity of such a sale there are several objections:

1. There was no bill of sale.

A bill of sale, by the maritime law, is necessary to transfer a ship or vessel.

In *Weston* vs. *Pinniman*, (1 Mason, 306, p. 316,) Judge Story said: "To be sure a bill of sale is necessary to pass the title of a ship. But this does not depend upon any enactment peculiar to our municipal law, but it grows out of the general maritime law, which requires such a document as a proper muniment of title of the ship."

In the case of the Two Sisters, (5 C. Robinson, 155, p. 159,) Sir William Scott said: "According to the ideas which I have always entertained on this question, a bill of sale is the proper title, to which the maritime courts of all countries would look. It is the universal instrument of transfer of ships in the usage of all maritime countries, and in no degree a peculiar title deed or conveyance known only to the law of England."

2. The property sold was not present, and no delivery is proved to have been made.

The evidence shows that the property was some fifteen miles from New River, and thirty-five north of Cape Florida, which was some two or three hundred miles northeast from Key West, where the sale is claimed to have been made, and no delivery was or could have been made at the latter place.

Delivery, actual or constructive, is clearly necessary to pass title. We are not to consider the effect of a bill of sale, because none is proved. This is a case of a sale of a ship and cargo hundreds of miles away, where no bill of sale was given and no delivery was made, so that there was neither actual nor constructive delivery; and, without the one or the other, no title could pass. No court has held that the title can pass when there was neither bill of sale nor delivery.

3. There is no evidence that the plaintiff paid any consideration for the assumed purchase of said vessel and cargo.

In addition to the defects above suggested, that there was neither bill of sale nor delivery, the plaintiff does not show that he paid any consideration whatever, without which the title would not pass; there is not an allusion in the evidence that anything was paid, much less how much. The plaintiff may have bid for the vessel and cargo, and the same have been struck down to him in the presence of the witnesses, and they may have deemed this a sale. But clearly it would not constitute a sale. The witness swears to a conclusion of law, instead of swearing to the facts, to enable the court to determine whether there was a sale or not. There is an entire omission of all facts from which the court can come to the conclusion that there was a sale. Without a bill of sale or delivery, or consideration proved, the court cannot say that there was a sale.

In the absence of these facts, there is no evidence which would bar a claim by the owners, should they demand compensation for this same vessel and cargo. There is not enough shown to prove a transfer of their rights, even if the master had the undoubted right to sell.

In *Hozey* vs. *Buchanan*, (16 Pet., 215, p. 220,) the Supreme Court held: "But the charge that 'a bill of sale, accompanied by possession,' constituted a good title in law, is liable to objection. That such an instrument connected with the possession is prima facie evidence of right may be admitted; but in the view of the evidence in the case,

there should have been the qualification that the transfer was bona fide, and for a valuable consideration."

In the present case there was no bill of sale, no delivery of possession, nor proof of consideration.

4. It is not shown that the captain had any authority to sell either ship or cargo.

There is no evidence that the master was clothed with any express authority by the owners to sell either. Nor is there any that any court adjudicated the sale. Nor does it appear that a survey was made by the proper persons to consider, advise, or determine as to the propriety of such sale, as is required by the maritime law in all cases where practicable, as it is shown to have been in this case.

There is no proof that there was a necessity for a sale; but, on the contrary, the plaintiff has shown that, at the time of the stranding, and for some time afterwards, the vessel and cargo might both have been saved, although, when Cooley abandoned them, it had become impracticable on account of the Indians.

It is well settled that the master of a vessel has no power to sell a ship or cargo except in cases of absolute and extreme necessity, to be clearly shown.

Abbott, in his treatise, says: "That in extreme cases, and in extreme cases only, he (the master) had the power to sell, as in the instance of a wreck which could not be got off, and ought not to be left to perish absolutely."

In *The American Ins. Co.* vs. *Centre*, (4 Wen., 45, pp. 51, 52,) Walworth, Chancellor, said: "I know of no principle which can authorize the abandonment of a vessel, either in port or elsewhere, merely because materials cannot be had there to make full repairs. If the ship is not injured to a moiety of her value, it is the duty of the master to make her seaworthy, and to proceed on the voyage." "The master is not authorized to sell the ship or cargo except in a case of absolute necessity, when he is not in a situation to consult with his owner, and when the preservation of the property makes it necessary for him to act as the agent of whom it may concern."

In the present case, the plaintiff himself expressly refers to the vessel and cargo after his purchase: "That I could have saved them, that I had the means of so doing, and that they were safe and secure on the beach, and might have remained so for a great length of time had it not been destroyed, must be abundantly evident," &c. (Record, p. 17.)

In *Gordon* vs. *Mass. F. & M. Ins. Co.*, (2 Pick., 249, pp. 262–'3–'4,) Parker, Ch. J., reviews the cases on the subject of the captain's power. He states the case where a survey is necessary, and urges its propriety, and quotes with approbation the opinion of Chief Justice Dallas in Ide *vs.* Exch. Ass. Co., (3 Moore,) which is as follows:

"The right to sell, as between the captain and owners, has been deemed of a very questionable nature; although upon the whole, extracting from the books what seems to be the weight of authority, I conceive that the right to sell must be considered to exist in cases of *extreme necessity*. A right, however, which in all cases must be strictly watched."

In *Hall* vs. *Franklin Ins. Co.*, (9 Pick., 466,) it was held: That "the necessity which will justify the master of a ship in selling her is one in which he has no opportunity to consult the owners or insurers, and which leaves him no alternative."

Kent (3 v., 173,) says: "But if the voyage is broken up in the course of it by ungovernable circumstances, the master, in that case, may even sell the ship or cargo, provided it be done in good faith, for the good of all concerned, and in a case of supreme necessity, which sweeps all ordinary rules before it. The merely acting in good faith and for the interest of all concerned is not sufficient to exempt the sale of goods from the character of a tortuous conversion, for which the ship-owner and the purchaser are responsible, if the absolute necessity of the sale be not clearly made out. Nor will the sanction of the vice-admiralty court aid the sale when the requisite necessity is wanting. All the cases are decided and peremptory, and upon the soundest principles, in the call for that necessity."

The same rules are laid down in Curtis's Rights and Duties of Merchant Seamen, pp. 186 to 189.

In the case of the schooner Tilton (5 Mason, 465,) Judge Story held: "The master of a ship has not, in virtue of his office, any authority to sell a ship, except in cases of extreme necessity, where the vessel is wrecked or ungovernable, &c. If he sells without such necessity, the sale is invalid, notwithstanding he acted in good faith, at least where the contest is between the owner and purchaser."

In the present case there was no necessity of a sale. The plaintiff disproves this necessity, and shows that the vessel and cargo both might have been saved and taken to Key West; and both the captain and he did take a large portion of the cargo from the vessel to that place. If a part of the cargo could be saved, the presumption is undoubted that the whole might have been. The plaintiff himself states, and then proves, that both vessel and cargo could have been got off and taken to Key West. This being so, the captain was under no necessity of selling, and consequently had no power to sell. If he had no power to sell, he could convey no title. It follows that the plaintiff took no title, and now has none to the property for which he claims pay.

It is no answer to say that the owner is not here contesting his right. He may come, and might do so after payment to the plaintiff. The facts now proved would show the property to be his; and if any one is to be paid, it should be him. It is an answer to the plaintiff when his evidence shows that he has no title against the owner. He can then have none against any one else.

SECOND. *The proceedings in the matter of the appraisal of the damages sustained by the plaintiff are no evidence of such damages.*

These proceedings are found from pages 6 to 9 in the record, and have no more legal validity than the like statement from any other persons. The judge was not authorized to appoint persons to ascertain the amount of loss sustained. The petition shows that the plaintiff asked for the appraisement, with the view of making the

United States liable, without giving them notice or allowing them to be heard.

Scott, one of the witnesses, who had been a sailor on the Gil Blas, swore to what was on the vessel at some time, but does not state when, and does not assert that he knew what was on board at the time of the burning. He does not mention that there was lead on board.

Cooley says that it was said that there were six tons of lead on board. He also states that "her sails and rigging, or most of them, and about 400 pounds of lead, were brought to Key West previous to the burning." (Record, p. 7.)

Neither of these witnesses give the value of any article on board. Still, Wall and Patterson assume to fix prices of articles which they had not seen nor heard valued, and the condition of which they did not inquire into, and did not know. They did not ascertain whether the articles could be removed, or at what expense. The witness did not furnish them any data on which to make up the valuation presented. They were not authorized by law to do what they did.

Again: There is no legal evidence of this assumed appraisal. The certificate of the county clerk, if genuine, is no evidence of the facts stated in it. His certificate does not prove that the papers were genuine originals, or that the witnesses had signed and swore to the papers, or that the judge had signed the order. These papers are no evidence of anything here, nor is there proof that they would be even in Florida. This court can only receive as evidence papers certified in conformity to a law of Congress, or the rules of the common law, authenticated in the manner pointed out in treatises on evidence.

THIRD. *There is no evidence from which damages can be computed.*

The evidence does not show that the witnesses had any personal knowledge of the quantity of lead or pig iron on board, and they could not have known. No witness affixed any value to one of the articles said to be on board the vessel. The court cannot, from the evidence, determine the quantity or the value, at the place where the vessel lay, of the things on board. The size and weight of the anchors are not given. Neither the length nor weight of the cables is specified, nor the size or quantity of sail or rigging. No evidence is given of the value of the water casks. There is no proof of the value of these things at Key West or other port, nor what it would have cost to take them out of the vessel and transport them to a market. Nor is a value fixed upon them at the place where they lay. Nor is it shown that they could have been sold for a dollar at that place. Nor is there any evidence of the state and condition of one of these articles, nor reason given by the witnesses why these things were left behind, when the sails and rigging, or most of them, and a part of the lead, were taken away and carried to Key West.

From the materials found in evidence in this record, no one can tell what damage the plaintiff has sustained, if any, by the burning of the vessel. The iron, anchors, and cables could not have been injured by burning the vessel, and the lead is not shown to have been

melted or otherwise injured. No effort is shown to remove these things after the hull of the vessel was burnt, although it is quite apparent that they could have been more easily removed after than before the burning, and must have remained so until storms and winds moved the sands where the vessel lay and covered up what remained unconsumed. This is not likely soon to have occurred after the burning in July. It is observable that the two witnesses, Cooley and Howe, who were sworn on interrogatories, although inquired of, were unable to affix any value to the things destroyed. (Record, pp. 22, 23.)

FOURTH. *It was the fault of the plaintiff that he did not secure the articles uninjured by the fire before they became totally lost, and his omission to do so is a bar to a recovery for them.*

The burning seems to have been done about the 25th of July, 1836. The wrecker (Cooley) employed by the plaintiff was present, and piloted the "Motto" up to the place where the Gil Blas lay. He did not object to the burning, nor intimate that anything more could be profitably saved. Howe seems to have had some special relations with the plaintiff, as he took a certificate of the burning to forward to him, (Record, p. 23;) and it is to be presumed that it was immediately sent to him. But no effort was made by the plaintiff, nor by Howe or Cooley in his behalf, to save the property which remained undestroyed. There is no evidence when the wreck became covered with sand; nor is there any that there were blows or storms soon after, which would be likely to cover her. There is no evidence that the plaintiff ever went there in search of his property, or sent there to see if anything could be saved. He seems to have made no effort whatever to save what remained uninjured. The next we hear of him he is preparing to make a claim against the United States for the property claimed, and is preparing and obtaining an ex parte valuation of it.

The United States, if accountable for the burning, are not responsible for the loss that may have resulted from his abandoning that part of his property which might have been saved by making proper exertions. They could only be called upon to indemnify him for the destruction of such of his property as the fire destroyed, and not to pay for such as remained uninjured, and might have been saved by proper exertions.

FIFTH. *At the time of the burning of the vessel the property had been abandoned upon territory of the United States, and therefore they are not liable for destroying it.*

The territory where the Gil Blas was stranded belonged to the United States, and they had a lawful right to control it. Property lying there in an apparent derelict state for a long period they had a right to treat as abandoned; and, if abandoned, to use or destroy it. This vessel was stranded in the fall of 1835, and her cargo had been nearly all taken away by the wreckers for the use of themselves as

salvors and for the owners. At a subsequent period the sails and rigging, or most of them, and some lead, were taken away, and then the vessel laid wholly unprotected until the next July. This is conclusive proof of abandonment. There is not a particle of evidence that the plaintiff, at the time of the burning, contemplated the getting off the hull or removing any more of the rigging or cargo. All laid there a perfect derelict and wholly abandoned. Under such circumstances, the United States had a right to take possession and use or destroy. Abandonment is determined, not by what the party may in fact intend, but by his acts, which others can see and observe, and from which they alone can act; and, when it has once taken place, it cannot be recalled.

SIXTH. *If the plaintiff became the purchaser of a foreign vessel and cargo on board, the presumption is that the latter was a foreign production; and if so, was subject to duties, for which the plaintiff is responsible; and not having been paid, the same was forfeited to the United States.*

The act of the 3d of March, 1825, (4 U. S. L., 133,) section 2d, provides:

"That all property, of every description whatsoever, which shall be taken from any wreck from the sea, or from any of the keys or shoals within the jurisdiction of the United States on the coast of Florida, shall be brought to some port of entry within the jurisdiction aforesaid;" that is, "in any court of the United States or Territories thereof having competent jurisdiction," as specified in the first section.

Who may be wreckers is provided by the act of 23d May, 1828, (4 U. S. L., 292.)

The act of March 1, 1823, (5 U. S. L., 736, § 21,) requires all goods taken from wrecks to be regularly appraised, with reference to the payment of duty.

Where the goods are raised from a vessel that has been sunk two years "in any river, harbor, bay, or waters" within the jurisdiction of the United States, and has been abandoned by the owner, they may be entered free of duty. (5 U. S. L., 609.)

If the plaintiff owned imported goods, he was bound, under the general law, to report and enter them at the nearest custom-house, and pay duty thereon.

By the then law, (4 U. S. L., 587,) the duty on anchors made of iron was two cents, and on cables three cents per pound, and on iron in pigs fifty cents per hundred and twelve pounds. The duty on lead in pigs and bars was three cents per pound. There were also duties on manufactures of hemp and woad. If accurately ascertained upon all the articles now claimed to have been destroyed, these duties would probably amount to near or quite as much as the present claim.

There is no evidence that the duty on these articles was ever paid, nor that there were any steps taken towards making an entry. This not having been done, the goods became forfeited to the United States, and they ceased to be the property of the plaintiff. They became

forfeited by the omissions of the party. The rights of the United States became perfect without an adjudication in an admiralty court, which would have been nothing more than indisputable evidence of the forfeiture, which is now proved in another way, but one equally as effectual. The question of forfeiture is now triable, when the plaintiff claims to be owner. He cannot be owner if the goods have been forfeited under a statute; and, if not the owner, then he cannot have sustained damages by the destruction of what was not his.

SEVENTH. *As the brig Gil Blas and her cargo were situated, under circumstances which existed in Florida, the United States were authorized to destroy both to keep them from falling into the hands of the enemy.*

The plaintiff has not shown that either the vessel or cargo was in his possession, or under his control, at the time of the burning. But, on the contrary, the last time that he, through his agent, Cooley, attempted to rescue and save the cargo, the Indians, by their violence and murders, put an end to the enterprise, and it was given up and abandoned. There is no evidence that the effort to save the goods was ever renewed. The plaintiff yielded to the adverse circumstances which surrounded the matter, and made no further effort.

We know from history, as well as from this record, that an Indian war existed in Florida, and that this part of it was in the possession and under the control of the Indians at that time. The Gil Blas was stranded opposite and near to the centre of the Everglades, from which our troops could not drive them. There the brig lay, after having taken from her the valuable part of her cargo, sails, and rigging, and everything that seemed to be worth incurring the expense of saving. Both the government and the plaintiff knew of this state of things. To prevent the Indians from supplying themselves with lead to aid in prosecuting the war, the United States officers went from Key West to the place where the vessel lay, being piloted by the plaintiff's agent or employé, and set fire to the vessel, which could not have been saved at that time. Lieutenant Lieb states that he and others, in the summer of 1836, "found the brig Gil Blas on shore about Cape Florida, said to have on board several tons of lead, and, apprehensive she might be found by the Indians, we burnt her; that the party could not at that time have saved the brig." (Record, p. 15.) He adds, that he could form no opinion of the inventory or appraisement, nor the claim therein made.

It is clear that they found her as a derelict, not in possession of any one; and that he did not see the property mentioned in the inventory, and had only heard of the lead said to be on board.

The plaintiff, if the owner, had left this property in a condition which was dangerous, with reference to the war and the enemy, without providing against its being converted into an instrument of destruction. Finding it in that condition, the officers of the United States stationed on that coast to aid in ending the war were in duty bound to destroy it. These officers judged of the necessity, and there is no evidence that they did not judge honestly and rightly, even if their decision could be now reviewed. It was not taking private

property for public use; but it was simply preventing private property, if it remained such, being taken by the public enemy to be used against private citizens and against the government. These officers had a right to destroy the property to prevent these consequences.

EIGHTH. *If the officers who burnt the brig were not authorized so to do as a part of their official duty, then they, and not the United States, are liable.*

If the destruction of the brig was legal, then plaintiff has no just cause of complaint; but if it was illegal, his remedy is against those who committed the illegal act. The United States are not responsible for the torts or illegal acts of its officers not in the line of their duty. They act by their agents, and only authorize them to perform lawful acts. When they go out of the line of their duty and do what is illegal, they alone are responsible for what they do. There is no law authorizing an officer to perform an illegal act.

NINTH. *This case does not arise under any law of Congress, or rule of a department, or contract, express or implied, and therefore the plaintiff cannot recover.*

There exists no law under which the plaintiff can recover. It is not within the cases where this court can determine that damages can be awarded. If it was a case of taking private property for public use, still, without legislation to carry the Constitution into effect, this court cannot award damages under it. Congress alone can prescribe the mode of action, and clothe the court with the power of executing the Constitution. That instrument addresses itself to the legislature, and the latter must provide for the execution of the Constitution. The government may take property, but it is for Congress to provide for the payment. No such provision has been made in this case. This court cannot supply for the defective action or omission of the legislature. It can only declare the rights that exist under present laws; and if there are none provided in this case, then it must so declare, and leave the party to go to Congress, which alone can make a law to confer the right now claimed.

R. H. GILLET,
Solicitor.

Dated June 11, 1859.

IN THE COURT OF CLAIMS.

June 14, 1860.

JOHN P. BALDWIN *vs.* THE UNITED STATES.

LORING, J., delivered the opinion of the court.

This case was referred to this court by an order of the Senate, made January 11, 1858.

The facts are, that in 1835 the Spanish brig Gil Blas was wrecked on the beach of Florida, about twenty miles northward of Cape Florida, and was shortly after, with her appurtenances and cargo, sold at auction at Key West by her captain, and purchased by the petitioner, who proceeded to take possession of her, and employed persons to remove from her her equipment and contents. She had on board of her a quantity of lead, iron, ballast, anchors and chains, sail rigging, and water casks.

In 1836 she was burned by the officers of the United States to prevent the lead and other contents of the vessel from falling into the hands of the Indians, with whom the country was then at war.

The vessel and her contents were thus lost to the petitioner, who claims an indemnity for his private property taken for public use.

It is objected that he does not prove title. But the vessel, her appurtenances and cargo, were purchased by the petitioner at public auction, (p. 12,) and he was in possession of her; and this is title enough against a stranger not claiming title, for it shifts the burden of proof.

It is then said that, if the act of the officers who destroyed the property was unauthorized, they and not the United States are liable. But the authority of the officers is presumable from the circumstances of the transaction. They were acting in their official capacity in the war which the country was then carrying on against the Indians, and their purpose of destroying the property to prevent the lead and other munitions of war from falling into the hands of the enemy was declared at the time.

It was argued that the United States had a right to destroy the property, because in its position "it was dangerous with reference to the war and the enemy." The United States had the right to destroy it, but not because it was a nuisance, in its nature pernicious to everybody, and therefore abatable by anybody, but only for the public good, and then subject to the constitutional provision.

It then was contended that the case shown was not one of taking private property for public use, but "simply preventing private property being taken by the public enemy to be used against private citizens and against the government;" but this was a public use, and the cost of it is to be borne by the public, who were benefited by it. We think the case is within the provision of the Constitution, on which the petitioner relies.

It was then contended that this provision of the Constitution could

not avail the petitioner because there was no act of Congress carrying the provision into effect; but none is necessary. The Constitution imposes on the United States the obligation of furnishing an indemnity for the property taken, and upon that obligation an implied contract arises, upon which, under the statute constituting this court, a claim against the United States may be maintained here.

We are of opinion that the petitioner is entitled to recover; but he has not produced any evidence by which we can adjudge the value of the property destroyed or the measure of the indemnity claimed.

The record shows that in 1838, on the petition of the petitioner, the judge of the county of Monroe, in the Territory of Florida, appointed appraisers to ascertain and certify to him the loss of the petitioner; and their return, certified by the affidavit of one of them, and signed by both, (p. 13,) was as follows:

6 tons lead	$480
5 tons kentledge	100
30 water casks	75
3 anchors	75
2 chain cables	300
Hull, sails, and rigging	170
	1,200

As the appraisers were the appointees of a court, and the performance of their duty wears the fairness of a judicial procedure, this testimony may be satisfactory, and better than any that is likely to be obtained now. But it is not admissible, because it is not taken in due form or on due notice, and it cannot be considered by the court nor used against a party objecting to its use.

The depositions of the commissioners show that they never were on board the brig and never saw the articles. They have, therefore, no personal knowledge of their quantities.

The petitioner claims, for six tons of lead, $480.

As to this, Cooley says in his first deposition, (p. 23,) "from the lapse of time I am unable to particularize as to value or different articles, but would refer the court to the answers made by me to interrogatories propounded to me soon after the burning of said brig;" and in his affidavit, made in 1838, (p. 7,) he testifies that the brig was burned "for the purpose of preventing the Indians from procuring a quantity of lead which was *said to be in her*, (six tons.) She also had on board about five tons of kentledge, thirty water casks, three anchors, and two chain cables.

This testimony as to the lead is stated as hearsay merely. As to the other articles, it is stated positively and as a matter of personal knowledge, and was perhaps sufficiently definite as to quantities to make a prima facie case.

In his deposition last taken Cooley is asked: "Did you see lead in said vessel; and did you weigh it, or how do you know how much there was on board?" (5th cross-inter.) He answers: "I saw a quantity of lead in said vessel's hold. I did not weigh it. I was in-

formed by the master that there was six or eight tons. It was in large pigs." This answer certainly does not show any personal knowledge as to the quantity of lead—it disclaims it.

Then the petitioner claims, for five tons of kentledge, $100.

As to this, Cooley is asked, "Did you weigh it, or how did you ascertain the quantity of it?" He answers: "I did see kentledge and iron cannon balls. The kentledge was in pigs, and in the vessel's hold. I did not weigh it." This does not show any personal knowledge, nor any means of such knowledge; and as the question called for a statement of such means, the implication is, he had none; and this indicates his affidavit before referred to was made without such means, and impugns the reliability of that.

Then the petitioner claims, for two chain cables, $300.

As to this, Cooley is asked, (7th cross-inter.,) "Did you see any, and how many, chain cables on board of said vessel; and of what size, form, and description, and length, and weight; and how do you know their weight?" He answers: "I saw two good chain cables, such as suitable for the anchors. One chain and anchor was run out astern to keep her from going further up on the shore. The anchor attached to this chain I did not see. I do not remember their length or weight."

Rigby says to the same question, "I saw two chain cables on board, one of which was run out aft, as already stated. I don't recollect their size or weight. She was a Spanish vessel, and had heavy ground tackle."

This is all the evidence in the case as to the length, size, or weight of the chain cables; and it does not prove their quantity, or furnish any basis for their valuation.

Then the petitioner claims, for three anchors, $75.

Cooley, in his affidavit, specifies *three* anchors, but when asked in his deposition last taken, (6th cross-inter.,) "Did you see any, and how many, anchors on said vessel; and of what size, form, and weight were they; and were they perfect or defective, or how otherwise?" answers, (6th answer:) "I saw two good anchors on board; their size and weight such as a vessel of her tonnage usually carries." And in answer to the same question, Rigby says: "I think there were two anchors on board; am positive there was one on the bow; also one attached to a chain carried out aft."

Thus these two witnesses concur, when directly questioned as to the number of anchors, in there being two anchors; and this testimony certainly tends to show there were only two, while the return of the commissioners specifies three anchors, and gives $75 as the valuation of the three. Cooley, in his affidavit, also specifies three anchors; so that, in this respect, that affidavit is impugned in accuracy by the extracts from the depositions above stated. As the whole testimony leaves the number of anchors in doubt, the valuation of the commissioners cannot be adopted.

The petitioner claims also, for hull, sails, and rigging, $170.

Cooley is asked, (3d cross-inter.,) "Were there any sails or rigging on said vessel; and if so, how many sails and what rigging?" and he answers: "There were all her sails and rigging there, beside a suit of

spare sails, which I brought to Key West." But in his affidavit he says: "Her sails and rigging, or most of them, and about four hundred pounds of lead, were brought to Key West." On this evidence the quantity, as to the sails, cannot be ascertained, and there is no other evidence in relation to it. Then the sails, rigging, and hull are put into one valuation by the commissioners, and it cannot be told what part of that was applied to the sails.

Then the petitioner claims, for thirty water casks, $75.

This is the precise number stated in Cooley's affidavit; but we think the examination we have above made of this document shows that it cannot be relied on as stating quantities on personal knowledge; and both Cooley and Rigby state in their depositions that they cannot *now* specify the number of casks; and Rigby testifies they were in the hold of the vessel, and Cooley testifies that some were on deck, but most of them were in the hold.

On the whole case we find that the evidence does not establish the quantities claimed nor any quantities, and this must be done, and by witnesses testifying on their personal knowledge; and until it is done there is nothing to which to apply the valuation of the commissioners, which is all their testimony can tend to establish.

We are of opinion that the petitioner does not show the amount of relief to which he is entitled by testimony on which this court can act. This is the result of a strict application of that rule of evidence which requires that witnesses should state facts on their personal knowledge; but this rule cannot be dispensed with by a court of law or equity, whatever may be the actual merits of the case before it.

The evidence proves clearly that the property of the petitioner was destroyed by the United States and "taken for public use," and that his application for relief has been pending in Congress till proof of it has been lost by the death or forgetfulness of witnesses, is probable. And the course of the petitioner in Florida, in applying to a court of the United States for commissioners to ascertain his loss, indicates a fair purpose on his part, and the report of the commissioners, (one of them the collector of the port and the other a merchant in the place,) acting officially as officers of the court—taking testimony under oath near the time and on the spot—might well, if admissible, have great weight, and there is nothing in the evidence to impugn its fairness; but, for the reasons stated above, it is not efficient evidence here.